No. 08-081070

IN THE

Supreme Court of the United States

SYCAMORE INDUSTRIAL PARK ASSOCIATES,

Petitioner,

v.

ERICSSON, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether "passive" disposal of a solid waste/hazardous substance (*e.g.*, asbestos insulation) through abandonment in place creates liability under the Resource Conservation and Recovery Act ("RCRA") and the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA").

2. Whether RCRA's statutory ambit that includes "other discarded material" as a solid waste is broader than CERCLA.

PARTIES TO THE PROCEEDING

Sycamore Industrial Park Associates, an Illinois general partnership, is Petitioner in this Court, was the appellant before the United States Court of Appeals for the Seventh Circuit, and was the plaintiff before the United States District Court for the Northern District of Illinois. Ericsson, Inc. is Respondent in this Court, was appellee in the Seventh Circuit Court of Appeals and was the defendant before the Northern District of Illinois.

CORPORATE DISCLOSURE STATEMENT

Sycamore Industrial Park Associates is an Illinois general partnership with two partners: Robert Boey and Sycamore Industrial Park, LLC. Sycamore Industrial Park, LLC is an Illinois limited liability company with Robert Boey as its sole member.

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The Seventh Circuit's opinion that gives rise to the questions presented is reported as *Sycamore Industrial Park Associates v. Ericsson, Inc.*, 546 F.3d 847 (7th Cir. 2008), and is reproduced in the appendix. (App. 1). The District Court's opinion which the Seventh Circuit affirmed is found at *Sycamore Industrial Park Associates v. Ericsson, Inc.*, Case No. 06 C 0768 (N.D. Ill. January 9, 2008), and is reproduced in the appendix. (App. 9). The Seventh Circuit order denying the petition for rehearing is found at *Sycamore Industrial Park Associates v. Ericsson, Inc.*, Case No. 08-118 (7th Cir. November 18, 2008) and is reproduced in the appendix. (App. 22).

JURISDICTION

The judgment of the court of appeals was filed on October 20, 2008. (App. 23). A timely petition for rehearing was denied, by order, on November 18, 2008. (App. 22). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The pertinent statutory provisions of the Resource Conservation and Recovery Act ("RCRA") and the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") are set forth in the appendix. (App. 24-42).

STATEMENT

Petitioner, Sycamore Industrial Park Associates seeks review of the decision of the Court of Appeals for the Seventh Circuit that liability under RCRA and CERCLA "require[s] affirmative action rather than merely passive conduct," such as abandoning asbestos in place. Putting aside the several errors of facts that plague the Seventh Circuit's opinion,[1] and despite its claim that the "vast majority of courts" are in accord, the decision is at odds with several circuits that hold that affirmative conduct is not required to implicate environmental liability under RCRA and CERCLA. Compounding its error, the Seventh Circuit, unlike the other circuits, ignored the broad statutory ambit of RCRA and, instead applied the narrower coverage of CERCLA when analyzing whether RCRA covers "passive" disposal or other "discarding" of asbestos.

A. Statutory Background

The Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901-6992k, is a comprehensive environmental statute that governs the treatment, storage and disposal of solid and hazardous waste. *See City of Chicago v. Envtl. Def. Fund*, 511 U.S. 328, 331-332 (1994). RCRA's primary purpose is to reduce

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[1] The panel repeatedly asserted that Petitioner claimed that a disposal occurred due to the sale of the property. Petitioner, however, has continuously maintained, and the record below supports, that the disposal—here, the affirmative abandonment of an asbestos-laden, useless heating system—took place *before* the sale of the property.

hazardous waste and to ensure the proper treatment, storage, and disposal of waste, "so as to minimize the present and future threat to human health and the environment." 42 U.S.C. § 6902(b). Thus, RCRA imposes strict liability upon "any person" who is contributing to or who has contributed to the disposal of hazardous substances that may present an imminent and substantial endangerment to health or the environment. 42 U.S.C. § 6973(a).

RCRA defines "solid waste" as "any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and other discarded material[.]" 42 U.S.C. § 6903(27). The regulations promulgated under RCRA define "discarded material" as any material which is abandoned by being disposed of, burned or incinerated or accumulated, stored or treated before or in lieu of being abandoned by being disposed of, burned, or incinerated. 40 C.F.R. § 261.2(a), (b). CERCLA incorporates these definitions. RCRA's citizen suit provision is broader than the scope of the regulation and includes waste materials generated by commercial activities, such as the abandonment of asbestos in place.

RCRA provides for certain private causes of action by citizens against violators. 42 U.S.C. § 6972. Section 7002(a)(1)(B) of RCRA authorizes citizens to bring a private cause of action against any person who causes or contributes to conditions which "may present an imminent and substantial endangerment to health or the environment" due to the disposal of a RCRA solid or hazardous waste. 42 U.S.C. § 6972(a)(1)(B). Thus, in a most fundamental manner, RCRA "defines" solid waste

to include both "disposed of" and "other discarded material." 42 U.S.C. § 6903(27). This definition certainly broadens the ambit covered by citizen suit environmental cases and is intentionally broader than CERCLA. H.R. Rep. No. 94-1491, pt. 1 (1976), reprinted in 1976 U.S.C.C.A.N. 6238.

B. Factual Background

Prior to 1985, Ericsson owned a 28-acre property, located in Sycamore, Illinois, for several decades. The property contains nine buildings, which were, until 1985, heated by a boiler-based heating system. The boilers and heating system were connected to the other buildings through a pipe network located outside of the buildings both below ground and in pipe chases located approximately 18 feet above ground. This heating system, as was common when built, was covered with easily removable, but now useless and abandoned, asbestos-containing insulation.

In January 1983, Ericsson ceased all of its manufacturing operations at the facility. In the winters of 1983 and 1984, the boiler-based heating system was experiencing difficulty and needed costly repair and maintenance. By the spring of 1985, Ericsson chose to abandon the boiler-based, asbestos-containing heating system and, instead, installed natural gas unit heaters. Upon installing the new heaters, Ericsson discontinued use of the obsolete, deteriorated asbestos-containing boiler-based heaters. Rather than properly dispose of the deteriorating asbestos that was part of the heating system, Ericsson chose to leave it, abandoned, in rafters and throughout the various buildings. Thereafter, Petitioner purchased the facility from Ericsson in 1985.

In 2004, Petitioner discovered the asbestos abandoned by Ericsson throughout the abandoned heating system. Petitioner instituted a RCRA private enforcement action to force Ericsson to remove and properly dispose of the abandoned asbestos insulation and to reimburse Petitioner for response costs that it had incurred or will incur in removing the asbestos. Petitioner brought an action in the United States District Court for the Northern District of Illinois, pursuant to the citizen suit provision of RCRA, 42 U.S.C. § 6972(a)(1)(B), and pursuant to CERCLA, 42 U.S.C. § 9607.

C. Procedural Background

On January 9, 2008, the District Court granted Ericsson's motion for summary judgment and denied Petitioner's cross-motion. (App. 9). Although the District Court found that Ericsson abandoned the asbestos in place at the property prior to sale, it held, as a matter of law, that "passive" disposal through abandonment did not constitute "disposal" of a solid or hazardous waste into or on any land or water. In addition, the District Court applied CERCLA's more limited definitions to the RCRA claim. In affirming the District Court, the Seventh Circuit departed from the reasoning of other circuits by requiring "active" disposal and by applying CERLCA coverage to RCRA. The Seventh Circuit affirmed the decision of the District Court. Petitioner petitioned the Seventh Circuit for rehearing en banc. On November 18, 2008, the Seventh Circuit denied Petitioner's petition for rehearing. The Petition is timely brought within ninety days of that ruling.

REASONS FOR GRANTING THE PETITION

This Court should grant review because the Circuits are fundamentally divided over whether passive disposal through abandonment is actionable under RCRA and CERCLA. The Seventh Circuit's decision requiring "active" disposal evidences a deep split between the circuits, in that the Seventh Circuit: (1) misinterpreted the "disposal" requirement of the Resource Conservation and Recovery Act (RCRA); (2) failed to properly place environmental liability on those responsible at the time of disposal rather than release ("polluter pays"); (3) is at direct odds with those Circuits holding that "passive" disposal is sufficient for liability; and (4) is contrary to the fact that RCRA liability is independent of and broader than CERCLA.

I.

The Courts Of Appeal Are In Conflict Concerning Whether "Active" Conduct Is Required For Liability Under For RCRA And CERCLA

In reasoning that Ericsson's acknowledged abandonment in place of the asbestos insulation did not give rise to liability, the Seventh Circuit held that "[a] plain reading of the 'has contributed or is contributing' language of § 6972(a)(1)(B) compels us to find that RCRA requires active involvement in handling or storing of materials for liability." *Sycamore Industrial Park Associates v. Ericsson, Inc.*, 546 F.3d 847, 854 (7th Cir. 2008). The panel also found that there was no "disposal" because Petitioner "cannot show that

Ericsson placed the asbestos into or on land or water, emitted it into the air, or discharged it into water." *Id.* at 853.

The Seventh Circuit's decision below is indicative of the serious jurisdictional split that has developed regarding whether liability under RCRA and CERCLA requires some additional affirmative action rather than so-called "passive" conduct, such as the abandonment of asbestos in place. The Second[2] and Sixth[3] Circuits, now joined by the Seventh Circuit[4], have developed a view of RCRA and CERCLA requiring a higher standard of affirmative action. In contrast, the Fourth Circuit[5], joined by several district courts in the First[6] and Eleventh[7] Circuits refuse to adopt such a "strained reading" that limits liability to active conduct. *United States v. Waste Ind., Inc.*, 734 F. 2d 159, 164-65 (4th Cir.

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[2] *ABB Indus. Sys. v. Prime Tech*, 120 F. 3d 351 (2d Cir. 1997).

[3] *Bob's Beverage v.* Acme, 264 F. 3d 692 (6th Cir. 2001); *U.S. v. 150 Acres of Land*, 204 F.3d 698 (6th Cir. 2000).

[4] *Sycamore Industrial Park Associates v. Ericsson, Inc.*, 546 F.3d 847 (7th Cir. 2008).

[5] *Crofton Ventures Ltd. P'ship v. G&H P'ship*, 258 F.3d 292 (4th Cir. 2001); *Nurad, Inc. v. William E. Hooper & Sons Co.*, 996 F.2d 837 (4th Cir. 1982), *cert. denied sub nom Mumaw v. Nurad*, 506 U.S. 940 (1992).

[6] *In re Hemmingway Transport*, 108 B.R. 378 (Mass. 1989), *aff'd* 126 B.R. 6 (Mass. 1991), *aff'd* 954 F. 2d 1 (1st Cir. 1992).

[7] *Southfund Partners III v. Sears, Roebuck and Co.*, 57 F. Supp. 2d 1369 (N.D. Ga. 1999); *Briggs & Stratton Corp. v. Concrete Sales and Services*, 20 F. Supp. 2d 1356 (M.D.Ga. 1998).

1984). The Third Circuit,[8] Ninth Circuit[9] and a district court in the Eighth Circuit[10] leave open the possibility that "passive" conduct could be sufficient for liability under RCRA and CERCLA.

Petitioner recognizes that the decisions addressing the "active"/"passive" dichotomy arise under factually distinct circumstances. The fundamental principles addressed in those cases – whether a party can only be liable for their "active" conduct – are equally applicable to the question of whether abandoning of asbestos in place gives rise to liability under RCRA and CERCLA.

The holding of the Seventh Circuit is instructive as to what it considers the state of the law in the face of this clear Circuit split: "[t]he vast majority of courts that have considered this issue read RCRA to require affirmative action rather than merely passive conduct – such as leaving a[n asbestos laden] heating system in place when selling the real estate that houses it – for handling or storage liability." (App. 8). Respectfully, this conclusion is incorrect on several levels and is a compelling reason requiring this Court's review.

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[8] *U.S. v. CDMG Realty Co.*, 96 F.3d 706 (3rd Cir. 1996)

[9] *Pakootas v. Teck Cominco Metals, Ltd.*, 452 F. 3d 1066 (9th Cir. 2006), *cert. denied, Teck Cominico Metals, Ltd. v. Pakootas*, 128 S.Ct. 858 (2008); *Carson Harbor Village Ltd. v. Unocal Corp.*, 270 F.3d 863 (9th Cir. 2001), *cert. denied, Carson Harbor Village Ltd. v. Braley*, 535 U.S. 971 (2002).

[10] *Couer D'Alene Tribe v. Asarco, Inc.*, 280 F. Supp. 2d 1094 (D. Idaho 2003).

As a threshold matter, taken together, CERCLA and RCRA are comprehensive statutes governing the handling, treatment, storage and disposal of solid and hazardous wastes. *See, e.g., City of Chicago v. Environmental Defense Fund*, 511 U.S. 328, 331 (1994). These statutes' primary purpose is to limit the harmful effects of solid and hazardous waste and "to minimize the present and future threat to human health and the environment." 42 U.S.C. § 6902(b). The strong public policy underlying RCRA is underscored by its citizen suit provisions. In RCRA, Congress specifically authorized citizen suits "against any person . . . who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment." 42 U.S.C. § 6972(a)(1)(B). Thus, because of the remedial nature of these provisions, liability should not be avoided on mere technicalities nor should courts strain to find exceptions to liability. Rather, the statutes should be liberally construed consistent with their broad intent to protect the environment. *Safe Air For Everyone v. Meyer*, 373 F. 3d 1035 (9th Cir. 2004).

As a starting point, RCRA defines "solid waste" as:

> Any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility, and other discarded material . . . resulting from industrial, commercial, mining and

> agricultural operations and from community activities[.]

42 U.S.C. § 6903(27).

In the case of asbestos, there can be little serious argument that abandoned-in-place asbestos insulation that is not being used for its intended purpose is indeed a solid or hazardous waste. Although it is not listed as a hazardous waste regulated by the United States Environmental Protection Agency ("USEPA"), asbestos is nonetheless a solid or hazardous waste within the RCRA and CERCLA statutory definitions. *See Metal Trades, Inc. v. United States*, 810 F. Supp 689, 697-701 (D.S.C. 1992).

However, the inquiry undertaken by the Seventh Circuit was whether such a substance can be considered "disposed of" or "handled" or "stored" or "otherwise discarded" without active involvement (apparently, something more than affirmatively choosing to leave it in place in lieu of removing it). In deciding that it could not, the Seventh Circuit joined those Circuits that narrowly interpret these remedial statutes.

In stark contrast, other circuits give a far more wide-ranging interpretation to the statutes, which is more in accord with their overall remedial purposes. Indeed, the interests implicated by this fundamental split are enormous. If some measure of additional "affirmative action" is required, then environmental liability will be limited to the time of discharge and eviscerate the time honored tenet that the "polluter pays;" the class of people potentially liable will be lessened and risk will

not be as efficiently spread; and *caveat emptor* will prevail. However, should "passive" conduct be sufficient, the remedial purposes of the statutory schemes will be better implemented; risks will be more completely and equitably shared; clean ups will be hastened as additional responsible parties will bear responsibility for their waste generating decisions, and will encourage more responsible environmental behavior as one will not be able to simply abandon a solid waste/hazardous substance without attendant responsibility. Alternatively, while both lower courts declined to acknowledge that abandonment in place is an affirmative act of disposal, distinguishable from merely migrating materials, abandonment of asbestos in place is an affirmative act of disposal sufficient to create liability under RCRA and CERCLA. Surely, one should not be permitted to escape responsibility for a choice not to act.

A. Passive Conduct Is Sufficient For Liability

The Fourth Circuit has explicitly held that active conduct is not a prerequisite for liability under RCRA or CERCLA, holding in *United States v. Waste Ind., Inc.* that only a "strained reading" of "disposal" would require "active human conduct." 734 F.2d 159, 164-65 (4th Cir. 1984). Nearly a decade later, in *Nurad, Inc. v. William E. Hooper & Sons Co.*, 966 F.2d 837 (4th Cir. 1992), the Fourth Circuit held that the term "disposal" in CERCLA has "a range of meanings," and is not limited to "only active conduct." More recently, the Fourth Circuit has reaffirmed *Nurad*'s holding. *Crofton Ventures Ltd. P'ship v. G&H P'ship*, 258 F.3d 292, 297 (4th Cir. 2001).

Nothing in the Fourth Circuit suggests that the predicate acts for liability under CERCLA or RCRA cannot and do not encompass the intentional abandonment of asbestos in place. The Seventh Circuit's imposition of an active participation requirement – that Ericsson had to remove the materials and leave them on the premises instead of just intentionally leaving them on the premises – would yield unreasonable and unjust results.

While there appears to be no First Circuit case that has directly decided this issue, several district court cases from the First Circuit suggest that the trend among the courts in that circuit is to refrain from imposing an active conduct requirement. For example, in *United States v. Ottati & Goss, Inc.*, 630 F. Supp. 1361 (D.N.H. 1985), the district court noted that "[t]he definition of 'disposal' is quite broad . . . '[S]ignificantly, it includes within its purview leaking, which ordinarily occurs not through affirmative action but as a result of inaction or negligent past actions.'" *Id.* at 1399. In *In re Hemmingway Transport*, 108 B.R. 378, 382 (Mass. 1989), *aff'd* 126 B.R. 6 (D. Mass. 1991), *aff'd* 954 F. 2d 1 (1st Cir. 1992), the district court there similarly held a "disposal" did indeed have a passive context.

Similarly, while the Eleventh Circuit has yet to resolve the question of whether "disposal" requires active conduct, several district court cases in that circuit hold that there is no such requirement. *See, e.g., Southfund Partners III v. Sears, Roebuck and Co.*, 57 F. Supp. 2d 1369 (N.D. Ga. 1999) (finding that the term "disposal" includes the leaking and spilling of hazardous materials from an uncapped tank caused by rainwater

displacing the hazardous materials). In *Briggs & Stratton Corp. v. Concrete Sales and Services*, 20 F. Supp. 2d 1356, 1370 (M.D. Ga. 1998), the court held that a "disposal" occurred for CERCLA purposes when hazardous substances leaked from containers that were abandoned on the property. Thus, although the Eleventh Circuit has not spoken on the issue, courts in that circuit have endorsed a passive theory for liability.

B. Passive Conduct May Be Sufficient For Liability

The Ninth Circuit has rejected the passive disposal theory in some circumstances, but has left the door open regarding whether passive conduct at all can give rise to liability under RCRA and CERCLA. In *Carson Harbor Village Ltd. v. Unocal Corp.*, 270 F.3d 863 (9th Cir. 2001), *cert. denied, Carson Harbor Village Ltd. v. Braley*, 535 U.S. 971 (2002), the circuit court concluded that "active" conduct was necessary, and held the migration of slag materials through a wetland was not a "disposal." However, as explained by the dissent, the Ninth Circuit left open "'disposal' may include other sorts of passive migration [which could include abandoning asbestos in place]." *Id.* As if commenting on the jurisdictional split, the dissent in *Carson Harbor* is instructive as to why a limitation on statutory environmental cleanup liability requiring "active" conduct is contrary to the purpose of RCRA and CERCLA: "[Requiring 'active' conduct] would allow a property owner who discovers hazardous waste passively migrating through the soil to escape all CERCLA liability simply by selling the property to another." *Carson Harbor*, 270 F.3d at 891. In 2002, this Court, in

declining to grant certiorari, left this question unanswered. *See Carson Harbor Village Ltd. v. Braley*, 535 U.S. 971 (2002).

Several years later, in *Pakootas v. Teck Cominco Metals, Ltd.*, 452 F. 3d 1066 (9th Cir. 2006), *cert. denied, Teck Cominico Metals, Ltd. v. Pakootas*, 128 S.Ct. 858 (2008), in the context of interpreting CERCLA's "release" requirement, the Ninth Circuit held that the passive leaching of hazardous substances from slag was sufficient to establish liability. *See also A & W Smelter & Refiners, Inc. v. Clinton*, 146 F.3d 1107, 1111 (9th Cir. 1998); *United States v. Chapman*, 146 F.3d 1166, 1170 (9th Cir. 1998).

In *United States v. CDMG Realty Co.*, 96 F.3d 706, 714 (3d Cir. 1996), the Third Circuit held that the gradual passive migration of contaminants cannot be a "disposal" for purposes of CERCLA, at least when the migration originated from the direct placement of contaminants in or on the soil. Although the court stated that it was inclined to view "disposal" as always limited to "active" migration, it recognized that some passive migration under certain circumstances might constitute a disposal. *Id.* The court also reserved judgment on "whether continuous seeping of contaminants from a hole in a drum constitutes [a] 'disposal.'" *Id.* at n.3.

District courts in the Eighth Circuit have also left open whether passive conduct can result in CERCLA liability. In *Couer D'Alene Tribe v. Asarco, Inc.*, 280 F. Supp. 2d 1094, 1113 (D. Idaho 2003), the court held that "[the] passive movement and migration of hazardous substances by mother nature (no human

action assisting in the movement) is still a 'release' for purposes of CERCLA in this case." While the *Asarco* case held that passive migration was sufficient to trigger CERCLA liability for purposes of a "release," it did not address the issue of whether such conduct would be a "disposal" under CERCLA.

C. Passive Conduct Is Not Enough To Establish Liability

In *United States v. 150 Acres of Land*, the Sixth Circuit held that unless there is "human activity," a "disposal" under CERCLA has not occurred. 204 F.3d 698, 706 (6th Cir. 2000). Similarly, in *Bob's Beverage v.* Acme, the Sixth Circuit reiterated its "active" conduct approach by holding that a party cannot be found liable under CERCLA unless the plaintiff demonstrates that a release by that party "affected the incurrence of response costs." 264 F. 3d 692, 696 (6th Cir. 2001).

The need for guidance by this Court on the issue of passive disposal is further evidenced by the fact that there apparently exists even an internal split in the Second Circuit, which has produced two opinions, one seemingly endorsing an active participation requirement and another opinion rejecting such a requirement. In *Connecticut Coastal Fishermen's Ass'n v. Remington Arms Co.*, 989 F.2d 1305 (2d Cir. 1993), the defendant was a trap and skeet shooting club. Lead shot and clay target fragments had been added to the land and waters surrounding the club over a period of nearly seventy years. *Id.* at 1308. According to the Second District, "none of the lead shot or the clay target fragments [had] been removed from" the surrounding

property or waters. *Id.* at 1310. The question presented was similar to that presented to the Seventh Circuit in this case: does "abandonment" require active human participation? The Second Circuit answered this in the negative, specifically stating that any view that RCRA is limited to "affirmative acts" "clearly is too narrow because it ignores legislative aim and fails to take into account the often nonvoluntary acts of depositing, spilling and leaking." *Id.* at 1313.

However, in *ABB Industry Systems, Inc. v. Prime Technology, Inc.*, 120 F.3d 351, 359 (2d Cir. 1997), the Second Circuit held that "mere passive migration" during ownership does not trigger CERCLA liability. Yet, like the Third Circuit, the Second Circuit qualified its analysis, stating that it expressed "no opinion" on whether leaking barrels might constitute a CERCLA disposal.

These disparate decisions of the circuits that have addressed the issue of whether RCRA or CERCLA liability requires active participation indicate that there is no consensus or trend among the circuits on this critical question of statutory interpretation. This Court's direction is urgently needed to resolve whether some form of additional active participation is necessary to trigger RCRA and CERCLA liability.

II.

Review is Necessary to Ensure Consistency of Application of the Statutory Environmental Scheme Among the Circuits

RCRA's citizen's suit provision, at 42 U.S.C. § 6972(a)(1)(B), imposes abatement responsibility on those who contributed to, or are contributing to "the past or present handling, storage, treatment, transportation or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment." *Id.* This provision is by its very nature broad and designed to encompass the gaps in environmental coverage found in CERCLA. Nevertheless, contrary to the statutory scheme, the Seventh Circuit endorsed an approach by which RCRA's citizen suit provisions are subsumed under CERCLA's narrower statutory provisions.

A RCRA citizen suit requires a discrete and separate analysis because the definition of "solid waste" is broader than CERCLA's statutory definition of hazardous waste. As the Second District explained in *Remington Arms*:

> The RCRA regulations create a dichotomy in the definition of solid waste. The EPA distinguishes between RCRA's regulatory and remedial purposes and offers a different definition of solid waste depending upon the statutory context in which the term appears . . . Currently, RCRA authorizes two kinds of citizen suits. The first, under § 7002(a)(1)(A), 42 U.S.C. § 6972(a)(1)(A), enables private

> citizens to enforce the EPA's hazardous waste regulations and – according to 40 C.F.R. § 261.1(b)(1) – invokes the narrow regulatory definition of solid waste. The second type of citizen suit, under § 7002(a)(1)(B), 42 U.S.C. § 6972(a)(1)(B), authorizes citizens to sue to abate an "imminent and substantial endangerment to health or the environment" . . . Consequently, the broader statutory definition of solid waste applies to citizen suits brought to abate imminent hazard to health or the environment.

Remington Arms, 989 F.2d at 1315. Yet, instead of employing the separate citizen suit standard – as the Fourth Circuit and other courts have consistently employed – the Seventh Circuit truncated its analysis and impermissibly converted the broader RCRA claim into a narrower CERCLA claim.

The result of such an analysis is startling and contrary to the statutory scheme. The requirement of additional "active" disposal creates the anomalous situation that abandonment of dangerous materials in place does not constitute a "disposal," but that those very same dangerous materials, if actively moved to another location and abandoned would constitute "disposal" trigging CERCLA and RCRA liability. Thus, those Circuits requiring "active disposal" hinge RCRA and CERCLA liability on whether the initial abandonment of the hazardous materials was in place or involved some sort of transportation to another location. This approach creates a strong disincentive to remedy potentially hazardous situations and, instead,

makes it better to abandon the same hazardous materials in place and thereby escape responsibility completely.

As if commenting on the need for this Court's guidance, the Fourth Circuit in *Nurad* stated:

> It is easy to see how the district court's requirement of active participation would frustrate the statutory purpose of encouraging "voluntary private action to remedy environmental hazards." Under the district court's view, an owner could avoid liability simply by standing idle while an environmental hazard festers on his property. Such an owner could insulate himself from liability by virtue of his passivity, so long as he transfers the property before any response costs are incurred. A more conscientious owner who undertakes the task of cleaning up the environmental hazard would, on the other hand, be liable as the current owner of the facility, since "disposal" is not a part of the current owner liability scheme under 42 U.S.C. § 9707(a)(1).

Nurad, 966 F.2d at 845-46.

As the Fourth Circuit went on to note, "[a] CERCLA regime which rewards indifference to environmental hazards and discourages voluntary efforts at waste cleanup cannot be what Congress had in mind." *Id.* And yet that is precisely the type of indifference to environmental hazards that is endorsed by the Seventh

Circuit's unreasonably narrow interpretation of CERCLA and RCRA. The legislative history of RCRA makes clear that that its reach was not meant to be limited in location:

> [T]he reach of RCRA was intended to be broad. It is not only the waste by-products of the nation's manufacturing processes with which the committee is concerned: but also the products themselves once they have served their intended purposes and are no longer wanted by the consumer. For these reasons the term discarded materials is used to identify collectively those substances often referred to as industrial, municipal or post-consumer waste; refuse, trash, garbage and sludge.

Id. at 2; *see also* H.R. Rep. No. 94-1491, pt. 1 (1976), reprinted in 1976 U.S.C.C.A.N. 6238, 6240.

Certainly, "post-consumer waste"—commonly known as "garbage" or "trash"—irrespective of location is covered by CERCLA and RCRA.[11] *Accord Amland*

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[11] The Seventh Circuit further departed from both the plain language of the statutes when it ruled that there was no "disposal" of asbestos because the asbestos was contained in the building. In doing so, the Seventh Circuit redrafted Section 6903(b), demanding evidence of "of soil, water or air contamination" to demonstrate that a material has been placed "into or on any land or water." *Sycamore*, 46 F.3d at 851-853. That decision equated the CERCLA "into or on any land or water" requirement with the RCRA "in the environment" requirement, and therefore severely and unreasonably restricts the reach of RCRA. Congress simply did not so provide.

Properties Corp. v. Aluminum Co. of America, 711 F. Supp. 784, 791-92 (D.N.J. 1989); *see also National Acceptance Co. v. Regal Products*, 838 F. Supp. 1315, 1320 (E.D. Wis. 1993) (trichloroethylene on the concrete floor of a degreasing pit in an industrial plant held to be "disposal" for CERCLA purposes; *United States v. Fleet Factors Corp.*, 821 F. Supp. 707, 721-22 (S.D. Ga. 1993) (hazardous substances on floor of industrial plant constitutes disposal under CERCLA); *BCW Assocs., Ltd. v. Occidental Chem. Corp.*, No. 86-5947, 1988 WL 102641 at *13 (E.D. Pa., September 29, 1988) (spreading lead dust onto floor of warehouse constituted disposal under CERCLA); *Emhart Indus., Inc. v. Duracell Int'l, Inc.*, 665 F. Supp. 549, 574 (M.D. Tenn. 1987) (spilling PCBs on floor of manufacturing plant constitutes disposal under CERCLA). When the presence of hazardous substances "is combined with an unwillingness of any party to assert control over the substances," a threat of release exists." *United States v. Northernaire Plating Co.*, 670 F. Supp. 742, 747 (W.D. Mich. 1987). Yet, the Seventh Circuit's ruling eliminates the question of whether a hazardous substance exists at a "facility" (a building) and instead creates a myopic focus into whether that hazardous substance exists outside "in the environment."

Lastly, RCRA's definition of solid waste, which is incorporated into CERCLA includes "other discarded material." 42 U.S.C. §. 6903(27). Clearly, meaning must be given to each word of a statute and the refusal to acknowledge abandoned in place solid/hazardous waste as properly giving rise to liability eviscerates the statute. As discussed above, RCRA sweeps into its ambit a broad range of disposals—active and passive—including

"other discarded material." Surely, abandoned in place asbestos is "other discarded material."

CONCLUSION

As this Petition for a writ of certiorari demonstrates, since the 2002 denial of certiorari in *Carson Harbor v. Braley*, the Circuit Courts of Appeal have remained in irreconcilable conflict as to whether RCRA and CERCLA liability may be engendered by both "passive" as well as "active" disposal. Thus, courts in three circuits recognize "passive disposal" as sufficient, courts in at least three circuits recognize liability as requiring "active disposal," and courts in four circuits leave open the possibility that passive conduct can constitute a "disposal" under certain circumstances. Accordingly, Petitioner requests that its Petition for writ of certiorari to the United States Court of Appeals for the Seventh Circuit be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DECIDED OCTOBER 20, 2008

UNITED STATES COURT OF APPEALS
SEVENTH CIRCUIT

No. 08-1118

SYCAMORE INDUSTRIAL PARK ASSOCIATES,

Plaintiff-Appellant,

v.

ERICSSON, INC.,

Defendant-Appellee.

Argued Sept. 9, 2008

Decided Oct. 20, 2008

Rehearing and Rehearing En Banc
Denied Nov. 18, 2008

Before FLAUM, WILLIAMS, and SYKES, Circuit Judges.

FLAUM, Circuit Judge.

In 1985, plaintiff Sycamore Industrial Park Associates bought an industrial property with fixtures,

including a boiler-based steam heating system, from defendant Ericsson, Inc. Before it sold the property, Ericsson installed a new natural gas heating system, but it left the old heating system in place. Several years after purchasing the property, Sycamore discovered that the boilers, pipes, and various pipe joints that make up the old system were insulated with asbestos-containing material. Sycamore sued to force Ericsson to remove and dispose of the abandoned asbestos insulation and reimburse Sycamore for alleged response costs it has incurred or will incur in removing the asbestos insulation. This action arises under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9607, and under the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6972. The district court granted Ericsson's motion for summary judgment, and Sycamore appealed. For the reasons explained below, we affirm the district court's grant of summary judgment.

I. Background

Ericsson owned the 28-acre property at issue, located in Sycamore, Illinois, for several decades. The property contains nine buildings where Ericsson manufactured electrical wiring and cable. During most of Ericsson's ownership of this property, the buildings were heated by the boiler system. The boilers are large mechanical units and are anchored to the floor of the two buildings that house them. They are connected to the other buildings through a pipe network. Most of the pipe network runs near the ceilings of the several

buildings and is connected to the structures at intervals by metal fasteners. All of the insulated piping is located inside the various structures of the facility except for two areas where the piping extends between buildings. The insulated piping that extends between buildings is encased in a mechanical piping chase or in a metal casing. To maximize thermal efficiency, most elements of the steam boiler system are covered with insulation. This insulation is physically attached to the steam boiler system and associated piping.

In January 1983, Ericsson ceased all of its manufacturing operations at this facility and sought to sell it to a third party. Soon thereafter, an Ericsson employee, Michael Kreiger, decided that he would like to purchase the property and operate it as an industrial park. Kreiger was Ericsson's vice president for managing services and purchases and was in charge of managing the Sycamore property for Ericsson.

Meanwhile, in the winters of 1983 and 1984, the boiler-based heating system was experiencing difficulty and needed costly repair and maintenance. In December 1984, while negotiating to sell the property to Kreiger, Ericsson leased part of the property to UARCO Inc. Before UARCO moved into the site, Ericsson installed asbestos-free natural gas unit heaters in the parts of the facility that UARCO would occupy.

In late 1984, Ericsson reached an agreement to sell the property to Kreiger. Kreiger then partnered with another Ericsson employee, Robert Boey, to form

Appendix A

Sycamore Industrial Park Associates as an Illinois general partnership. As soon as the sale was completed, Kreiger would transfer ownership in the facility to the Sycamore partnership.

In the spring of 1985, Ericsson installed additional natural gas unit heaters so that the entire facility could be heated with the new units. Upon installing the new heaters, Ericsson discontinued use of the old boiler-based heaters, but it left the old heating system in place.

Ericsson's sale of the property to Kreiger closed on May 30, 1985. Kreiger immediately assigned the property to Sycamore. Ericsson did not remove the old heating system at the time of sale; the boilers and piping remained completely in place after the sale. At the time of the sale, neither Kreiger nor Boey requested that Ericsson remove the old heating system.

The abandoned boiler-based steam heating system has not been used for the purpose of heating the buildings since the 1985 closing. The parties disagree as to whether the system is merely turned off, meaning that it could be utilized again, or whether it is inoperable.

In 2004, Sycamore discovered asbestos in the insulation that covered the steam boiler system and associated piping. The parties dispute the circumstances under which the asbestos was discovered. Ericsson describes the discovery as the result of a repair and maintenance operation in an attempt to show that Sycamore was contemplating use of the boiler-based

system. Sycamore responds that it discovered asbestos during a routine inspection by a prospective tenant and that it was not considering utilizing the old heating system.

Sycamore sued Ericsson, seeking to compel it to remove the asbestos-laden insulation. Sycamore claims that by discontinuing use of the boiler-based heating system containing asbestos insulation but not removing it from the site, Ericsson violated CERCLA and RCRA. Sycamore also sued under state law nuisance and negligence theories not at issue on appeal.

On January 9, 2008, the district court granted Ericsson's motion for summary judgment. The district court found that the defendant abandoned the asbestos insulation in place at the property prior to sale. Yet it held as a matter of law that the abandonment did not constitute "disposal" of a solid or hazardous waste into or on any land or water so that such solid waste or hazardous waste might enter the environment, as CERCLA requires. In addition, the district court held as a matter of law that the abandonment of the boiler-based heating system and the subsequent sale of the Sycamore property was not "handling, storage, treatment, transportation or disposal of any solid or hazardous waste," as required by RCRA. Sycamore appeals the district court's decision on the CERCLA and RCRA claims.

Appendix A

II. Discussion

A. Standard of Review

This Court reviews a district court's grant of a motion for summary judgment de novo. *Jackson v. County of Racine*, 474 F.3d 493, 498 (7th Cir.2007). In doing so, all facts and reasonable inferences are construed in the light most favorable to the nonmovant party, Sycamore. *Lawson v. CSX Transp., Inc.*, 245 F.3d 916, 922 (7th Cir.2001). A district court's grant of summary judgment is to be affirmed if "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c).

B. CERCLA Claim

CERCLA liability attaches when a plaintiff establishes that: (1) the site in question is a "facility" as defined by CERCLA; (2) the defendant is a responsible party; (3) there has been a release or there is a threatened release of hazardous substances; and (4) the plaintiff has incurred costs in response to the release or threatened release. 42 U.S.C. § 9607(a); *Envtl. Transp. Sys., Inc. v. ENSCO, Inc.*, 969 F.2d 503, 506 (7th Cir.1992); *3550 Stevens Creek Assocs. v. Barclays Bank*, 915 F.2d 1355, 1358 (9th Cir.1990). The second and third elements are at issue here.

CERCLA states that a prior owner of a facility is a responsible party if it controlled the site "at the time of disposal" of a hazardous substance. 42 U.S.C. § 9607(a)(2). We have held in the past that asbestos is a hazardous substance within the meaning of CERCLA. *G.J. Leasing Co. v. Union Elect. Co.*, 54 F.3d 379, 384 (7th Cir.1995). Therefore, for Ericsson to be a responsible party, Sycamore only needs to show that a disposal took place before Ericsson relinquished control of the site. CERCLA adopts the definition of "disposal" from the Solid Waste Disposal Act, which defines "disposal" as:

> [D]ischarge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters.

42 U.S.C. § 9601(29); 42 U.S.C. § 6903(3). Accordingly, to make a case for Ericsson's liability as a responsible party, Sycamore must establish that at the time it controlled the site it discharged, deposited, injected, dumped, spilled, or leaked a solid or hazardous waste or placed it into or on any land or water.

One issue that arises is whether the asbestos-laden boiler system is solid or hazardous waste. While CERCLA purports to cover both solid and hazardous

waste, in order to be hazardous waste the material must be solid waste because the statute defines "hazardous waste" as "a solid waste, or combination of solid wastes, which because of its quantity, concentration, or physical, chemical, or infectious characteristics" may be hazardous. 42 U.S.C. § 9601(29); 42 U.S.C. § 6903(5). "Solid waste" is then defined as "any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and other discarded material." 42 U.S.C. § 6903(27). The parties dispute whether the asbestos materials that Ericsson left in the facility can be categorized as "discarded material" to satisfy the "solid waste" definition. However, we do not need to address this question. Assuming *arguendo* that the asbestos material is solid waste, Ericsson's actions still do not constitute "disposal" because it did not place the asbestos into or on any land or water so that it may enter the environment or be emitted into the air or discharged into any waters, as required by § 6903(3).

Sycamore argues that Ericsson disposed of the asbestos materials when it abandoned them in place and then transferred the site to Sycamore. In other words, they claim that by selling the real estate, Ericsson was disposing of the asbestos.

In *G.J. Leasing v. Union Electric Company*, the plaintiffs advanced an argument very similar to Sycamore's argument here: that Union Electric disposed of a hazardous substance when it sold real estate containing asbestos. In that case, Union Electric

sold a power station consisting of power generation equipment housed in a structure with significant amounts of asbestos in the walls. *G.J. Leasing*, 54 F.3d at 382-84. In *G.J. Leasing*, we determined that the mere sale of property containing a hazardous substance is not a disposal imposing liability. Our decision in *G.J. Leasing* emphasized that the only exposure to asbestos was inside the building; there was no apparent danger to air, land, or water outside of the building as required for "disposal." *Id.* at 383. We acknowledged that if the primary purpose and likely effect of the sale was to remove the asbestos in circumstances that would make the release of asbestos to the outside environment inevitable, the transferor could be held liable under CERCLA. But without such intent and likely effect, we concluded that asbestos abandoned in place in a structure did not lead to CERCLA liability. *Id.* at 385.

The Ninth Circuit reached the same conclusion in *Stevens Creek*, 915 F.2d 1355. Our sister Circuit determined there was no private cause of action under CERCLA for the sale of a building containing materials with asbestos because the defendant never "disposed" of a hazardous substance. It reasoned that asbestos built into a building could not enter the environment or be emitted into the air, as required by the definition of "disposal." Even if the asbestos broke off, asbestos fibers would remain in the building. *Stevens Creek*, 915 F.2d at 1361.

G.J. Leasing and *Stevens Creek* are on point here. All asbestos insulation at the Sycamore facility is either

inside a building or enclosed in a pipe chase or metal case.[1] There is no real threat that asbestos "or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground water," as CERCLA requires in § 9601(29).

Sycamore attempts to distinguish *G.J. Leasing* and *Stevens Creek*. It argues that in those cases the asbestos-containing material was being used for its intended purpose (to insulate structures), whereas in the instant case the asbestos insulation was no longer serving a purpose because the boiler-based heating system was out of operation. In fact, in *G.J. Leasing* the power plant was obsolete and "decommissioned." *G.J. Leasing*, 54 F.3d at 381-82. More importantly, this distinction does not make the reasoning from *G.J. Leasing* or that from *Stevens Creek* inapplicable to the scenario at issue in this case. Like in those cases, here there is no real

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1. Plaintiff cites testimony of David Kedrowski, defendant's expert, to argue that there may be another pipe underground. Kedrowski testified: "I was informed by Mr. Boey that there was another pipe extending underground between two of the buildings described as running to and from the underground pipe. The pipes I could see were not covered with insulation, at the locations where they were described as running to and from an underground pipe." (Pl.Br.36). This testimony does not affect the conclusion that all *insulated* piping was encased because Kedrowski explicitly states that there was no insulation around this pipe. Moreover, Kedrowski's expert testimony is limited to the condition of the equipment after litigation was commenced. It cannot establish a disposal or release or threat of release at the time of sale.

possibility of asbestos entering the environment, as required to have a "disposal." For CERCLA liability, the defendant must be a "responsible party," defined as a party that controlled the site "at the time of disposal" of a hazardous substance. 42 U.S.C. § 9607(a)(2). Without a disposal, Ericsson is not a responsible party.

It is worth noting that in *G.J. Leasing* we also pointed out practical reasons why "the sale of a product which contains a hazardous substance cannot be equated to the disposal of the substance itself or even the making of arrangements for its subsequent disposal." *Id.* at 384. As we noted, a contrary rule would mean that sale of an automobile is an arrangement for disposal of a hazardous substance because every automobile contains lead in the battery. *Id.* We carved out an exception to this general principle, recognizing that an owner who wants to get rid of a toxic retaining pond, for example, cannot avoid CERCLA "arranger" liability merely by selling his entire facility, which includes the pond, to an unsuspecting purchaser. We described the toxic retaining pond example as the "malicious motive case." *Id.* We also recognized a third category of cases, the "mixed-motive case," in which a seller's intent is both to dispose of hazardous waste and make a bona fide profit. We stated the limiting principle may be whether the materials are sold for reclamation. *Id.* Here, there is no evidence that Ericsson transferred the Sycamore property with the intent to dispose of a hazardous substance. It incidentally left the old heating equipment in place when it sold otherwise useful realty. It simply does not make sense to hold that Ericsson is a

responsible party just because Sycamore decided to remove asbestos in place decades after it purchased valuable real estate in a legitimate transaction.

Even if we were to find that Ericsson is a responsible party, CERCLA also requires that there has been a release or there is a threatened release of hazardous substances. There is substantial overlap in terms used to define "disposal" and "release," so analysis of the "release" element required for CERCLA liability inevitably overlaps with "responsible party" analysis. *See Carson Harbor Village, Ltd. v. Unocal Corp.*, 270 F.3d 863, 879 (9th Cir.2001). CERCLA defines a "release" as "any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment." 42 U.S.C. § 9601(22). The term "environment" includes any "surface water, ground water, drinking water supply, land surface or subsurface strata, or ambient air within the United States." 42 U.S.C. § 9601(8).

The asbestos at the Sycamore facility is contained inside the buildings of the facility or, in the instances when insulated piping runs between buildings, is enclosed in a piping chase or in a metal case. Sycamore has not presented evidence—such as evidence of soil, water or air contamination—showing that the asbestos insulation has been placed "into or on any land or water" or emitted into the air as the applicable definition of "disposal" requires. We have stated that "the release of asbestos inside a building, with no leak outside, . . . is not governed by CERCLA." *G.J. Leasing*, 54 F.3d at

385; *see also Covalt v. Carey Canada, Inc.*, 860 F.2d 1434, 1439 (7th Cir.1988) ("the interior of a place of employment is not the environment for purposes of CERCLA"). The Ninth Circuit in *Stevens Creek* similarly suggested that when any resulting hazard from emission of asbestos fibers into the air would be confined to the interior of the building, there is no release or threat of release, and CERCLA does not apply. *Stevens Creek*, 915 F.2d at 1359-60. We reaffirm that when there is no emission into the outside environment, but rather any hazard resulting from emission of asbestos fibers would be confined inside a building, there is no release or threatened release, and thus there can be no liability under CERCLA. Even viewing all facts in the light most favorable to Sycamore, Ericsson's abandonment of the asbestos-laden insulation in place at the Sycamore site does not make it liable under CERCLA.

C. RCRA Claim

The RCRA citizen suit provision states, in relevant part, "any person may commence a civil action . . . against any person, . . . who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment." 42 U.S.C. § 6972(a)(1)(B).

To establish RCRA liability, Sycamore must show that Ericsson "handled, stored, treated, transported, or disposed of" solid or hazardous waste. Sycamore first

argues that Ericsson "disposed" of the boiler-based heating system when it abandoned the system in place. The definition of "disposal" is the same under RCRA and CERCLA, because RCRA also adopts the definition from the Solid Waste Disposal Act, which is its predecessor statute. 42 U.S.C. § 6903(3). Once again, because Sycamore cannot show that Ericsson placed the asbestos into or on land or water, emitted it into the air, or discharged it into water, we do not need to address the closer question whether the asbestos contained in the boiler-based heater satisfied the "solid or hazardous waste" requirement. Because the definition of "disposal" is the same, our reasoning that established that there was no disposal under CERCLA applies to a RCRA analysis as well. Sale of a facility with an abandoned asbestos-containing boiler system does not meet the statutory definition of "disposal."

Sycamore argues in the alternative that even if Ericsson did not dispose of the asbestos insulation, Ericsson is nonetheless liable because it handled and stored the asbestos insulation. Yet Sycamore presents no evidence that Ericsson handled, stored, or even touched any part of the heating system. In fact, there is no evidence that Ericsson did anything to the asbestos-containing boiler system or its insulation prior to or after closing the sale with Sycamore. A plain reading of the "has contributed or is contributing" language of § 6972(a)(1)(B) compels us to find that RCRA requires active involvement in handling or storing of materials for liability. The ordinary meaning of "contribute" is "to act as a determining factor." *Webster's II New College*

Dictionary (2005). By definition, the phrase "has contributed or is contributing" requires affirmative action. The vast majority of courts that have considered this issue read RCRA to require affirmative action rather than merely passive conduct—such as leaving a heating system in place when selling the real estate that houses it—for handling or storage liability. *See ABB Industrial Sys., Inc. v. Prime Tech., Inc.*, 120 F.3d 351, 359 (2d Cir.1997); *Interfaith Cmty. Org. v. Honeywell Int'l*, 263 F.Supp.2d 796, 844-46 (D.N.J.2003); *Delaney v. Town of Carmel*, 55 F.Supp.2d 237, 255-57 (S.D.N.Y.1999); *Marriott Corp. v. Simkins Indus., Inc.*, 929 F.Supp. 396, 398 n. 2 (S.D.Fla.1996). Thus, as a matter of law, by leaving equipment that is insulated by asbestos in place and then selling the Sycamore property, Ericsson did not handle, store, treat, transport, or dispose of the asbestos as required for RCRA liability.

III. Conclusion

For the foregoing reasons, we Affirm the district court's grant of summary judgment for defendant.

APPENDIX B — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION DATED JANUARY 9, 2008

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

No. 06 C 0768

SYCAMORE INDUSTRIAL PARK ASSOCIATES, an Illinois general partnership,

Plaintiffs,

v.

ERICSSON, INC., a Delaware corporation,

Defendant.

MEMORANDUM OPINION AND ORDER

DAVID H. COAR, District Judge.

Sycamore Industrial Park Associates ("SIPA") filed a civil action against Ericsson, Inc. (*"Ericsson"*) under the Comprehensive Environmental Response, Compensation and Liability Act (the *"CERCLA"*), codified at 42 U.S.C. § 9601 *et seq.* , 26 U.S.C. §§ 4611-4612, 4661-4662 (2006) and the Resource Conservation and Recovery Act (the *"RCRA"*), codified at 42 U.S.C.

§ 6901 *et seq.* (2006) to compel Ericsson to remove asbestos located at a site SIPA purchased from Ericsson; to pay SIPA recovery costs that SIPA incurred or will incur in removing the asbestos; to pay a civil fine for each day Ericsson violated and continues to violate RCRA and the Illinois Environmental Protection Act; and other additional remedies. SIPA also brings Illinois common law claims of nuisance and negligence against Ericsson and seeks damages, restitution of all costs incurred by SIPA in the remediation of the site and an injunction to remove and abate the nuisance of asbestos. Ericsson now moves for summary judgment on all claims of the Complaint and SIPA moves for partial summary judgment on its RCRA and CERCLA claims. For the reasons stated in the opinion below, Ericsson's motion is GRANTED in part, and SIPA's motion is DENIED.

I. UNDISPUTED FACTUAL BACKGROUND

On May 30, 1985, Ericsson sold Michael Kreiger, an Ericsson employee until sometime in or around May 1985, an industrial park (the "*Site*") complete with finished buildings on 28 acres of land. Once the transaction closed Kreiger contemporaneously assigned his interests in the Site to SIPA. In his capacity as an Ericsson employee, Kreiger was in charge of preparing the Site for sale. Ericsson used a boiler-based heating system to provide heat throughout the buildings on the Site. The boiler-based system consists of boilers, pipes and other equipment containing asbestos insulation. The boilers are large mechanical units, structurally anchored to the floor of the buildings which house them at their

bases, and are otherwise attached to the buildings through pipe runs. The pipe network that distributed heat is also physically attached to the boilers, and physically attached to the various buildings to and through which they run. Most of the pipe network runs near the ceilings of the several buildings, connected to the structures at intervals by metal fasteners or supports. The pipe network of the steam boiler system runs for thousands of linear feet through the structures comprising the Site.

Before eventually selling the Site to Kreiger, Ericsson leased part of the property to UARCO in December of 1984. Until January 1985, the complete boiler-based heating system was providing heat to the buildings of the Site. However, in the winter seasons of 1983 and 1984, the boiler-based system was working with increasing difficulty. When UARCO moved onto the Site in January 1985, Ericsson discontinued use of the boiler-based system in UARCO's buildings and began using a new non-asbestos containing heating system. Ericsson never removed the old heating system. Neither Krieger nor SIPA requested Ericsson to remove the old system. Despite the fact that the sales contract between Ericsson and Krieger states the purchase consists of "all parcels, buildings and improvements thereon, . . . together with all rights, titles, interests, hereditaments and appurtenances relative thereto, personal property, fixtures, . . . if any," SIPA claims it did not purchase the boiler system. According to Kreiger, he concluded in April 1985 that the boiler system was garbage and had to be shut down. He stated that Robert Boey, an

Ericsson engineer in charge of determining how to provide heat to the Site's buildings and who reported to Kreiger, came to this conclusion in September 1983. Ericsson obviously concluded at some point that it was not economically reasonable to maintain, repair or operate the boiler-based system and so it ceased its use. Although the parties dispute what roles Krieger and Boey occupy in SIPA, it is undisputed that both former Ericsson employees are affiliated with SIPA in some capacity.

SIPA now claims that by discontinuing use of the boiler-based heating system containing asbestos insulation but not removing it from the Site, Ericsson abandoned it, thereby disposing of hazardous waste under the terms of CERCLA and RCRA. SIPA also claims that the old heating system is a common law nuisance and that leaving the system was an act of negligence that continues to harm SIPA.

II. STANDARD FOR MOTIONS FOR SUMMARY JUDGMENT

Summary judgment will be granted only when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. Pro. 56(c). A genuine issue of material fact exists only if there is sufficient evidence for a reasonable finder of fact to return a verdict for the nonmoving party. *Anderson v. Liberty*

Lobby, Inc., 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). A fact is material if it can affect the outcome of the case under the applicable substantive law. *Id.* When reviewing a motion for summary judgment, the court must view the facts in the light most favorable to the nonmoving party and draw all reasonable inferences in that party's favor. *Schuster v. Lucent Tech. Inc.*, 327 F.3d 569, 573 (7th Cir.2003).

The movant bears the burden of establishing that no genuine issue of material fact exists. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). If the movant meets this burden, the non-movant must set forth specific facts demonstrating that there is a genuine issue for trial. Fed. R. Civ. Pro. 56(e); *Celotex*, 477 U.S. at 324. To successfully oppose the motion, the non-movant must designate these facts in affidavits, depositions, answers to interrogatories, or admissions; the non-movant cannot rest on the pleadings alone. *Celotex*, 477 U.S. at 324.

III. ANALYSIS

CERCLA Claim

Liability under CERCLA is established when the following four elements are met: (1) the site in question is a "facility" as defined by CERCLA; (2) the Defendant is a "responsible person" as defined by CERCLA; (3) there was a "release or threatened release" of hazardous substances; and (4) such release caused the Plaintiff to incur response costs. *Envtl. Transp. Sys.*,

Inc. v. ENSCO, Inc., 969 F.2d 503, 506 (7th Cir.1992) (citations omitted); *3550 Stevens Creek Assocs. v. Barclays Bank*, 915 F.2d 1355, 1358 (9th Cir.1990). In *G.J. Leasing Co. v. Union Electric Company*, a purchaser of a decommissioned power plant containing asbestos in its structure sued a former owner under CERCLA. 54 F.3d 379 (7th Cir.1995). The Court held that "the sale of a product which contains a hazardous substance cannot be equated to the disposal of the substance itself or even the making of arrangements for its subsequent disposal ..." *Id.* at 384. SIPA attempts to evade the holding of *G.J. Leasing* by recasting its claim to the effect that Ericsson unlawfully disposed of asbestos when it stopped using a functionally obsolete heating system containing asbestos insulation out of service and left it on a site that it later sold. In *G.J. Leasing*, the entire facility was obsolete and useless and had thus been decommissioned and rendered dormant by the owner. 54 F.3d at 382. It was then sold to a salvager. *Id.* The Court recognized that the presence of asbestos played no role in the decision to decommission the facility. *Id.* Similarly, SIPA does not claim nor has it offered any evidence that the asbestos insulation on the boiler-based heating system motivated Ericsson to cease its use. Instead, SIPA continuously focuses on the fact that the boiler-based system was inoperable junk that was not worth the trouble of maintaining or repairing.

In *3550 Stevens Creek Associates*, the Ninth Circuit declined to recognize a private cause of action under Section 107(a) of CERCLA for the voluntary removal of

asbestos from a commercial building. 915 F.2d at 1365. After conducting a thorough analysis of the relevant sections and subsections of CERCLA and the Solid Waste Disposal Act, as amended by the RCRA, from which the definitions of certain terms used by CERCLA and RCRA are taken, the Court held that the *installation* of asbestos containing materials into a building did not amount to disposal of waste materials such that the plaintiff could pursue a CERCLA private cause of action against an owner of a commercial building. *Id.* The Court stated that "[o]n its face "disposal" pertains to 'solid waste or hazardous waste,' not to building materials which are neither." 915 F.2d at 1361. The Court also found that CERCLA's legislative history was devoid of evidence of a congressional intent to permit private causes of action for the recovery of response costs for the removal of asbestos from buildings. *Id.* at 1365.

SIPA attempts to distinguish *3550 Stevens Creek Associates* on the basis that the asbestos there was in operation as a useful product in the structure. Here, the asbestos in question belongs to a heating system no longer in use by the time Ericsson sold the Site.[1] SIPA argues that the boiler system was inoperable and useless. By leaving the inoperable old asbestos-laden system where it had been originally installed, SIPA argues that Ericsson disposed of it because it is "solid waste," i.e. "discarded material" under the statutory scheme.

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1. Whether or not the heating system was operable at the time of the sale is a disputed fact that the Court resolves in favor of SIPA for purposes of this motion only.

Appendix B

The *3550 Stevens Creek Associates* court unambiguously held that building materials installed into the structure was not "placing into or on any land and water." *Id.* at 1362. If the action of installing materials into a structure is not "placing into or on any land and water," then abandoning materials within a structure, that is leaving the materials in place within the building, cannot be "placing into or on any land and water" either. SIPA attempts to confuse the issue by arguing that the asbestos here is not built into the structure of the Site, but the undisputed facts demonstrate that the asbestos is attached to the pipes and boilers, which are in turn attached to the various buildings of the Site.

This Court's decision that the system is not "solid waste" does not ignore the language of the statute, contradict Seventh Circuit precedent or frustrate the fundamental purposes of CERCLA. Title 42 U.S.C. § 6903(3) provides that " 'disposal' means the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters." Ericsson did not place the asbestos materials anywhere. Although courts have held that the term "disposal" contains a passive element that must not be ignored, the term is not so broad as to render an owner liable for merely discontinuing use of equipment that is physically attached to otherwise useful realty.

Appendix B

The Seventh Circuit stated in *G.J. Leasing Co. v. Union Electric Company* that although "asbestos is a hazardous substance within the meaning of CERCLA, . . . asbestos is harmless as long as the asbestos fibers are not allowed to leak out of the walls or other building components in which the insulation was placed." 54 F.3d at 385. Apparently, SIPA took note of this fact because it asserts in its materials that the asbestos in question may be friable.[2] However, the *G.J. Leasing Co.* court also explained that "the release of asbestos inside a building, with no leak outside . . . is not governed by CERCLA." *Id.* (citations omitted.). It is apparent from the facts SIPA chose to present in these proceedings that it has no evidence that asbestos is being released "into the environment" within the meaning of CERCLA.[3]

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2. Yet, SIPA also points out in its materials that the asbestos is in place and remains intact.

3. Thus, assuming *arguendo* that the asbestos-laden boiler system is "solid waste" under 42 U.S.C. § 6903(27) as SIPA contends, abandoning a heating system within a series of buildings would probably still not satisfy the definition of "disposal" under 42 U.S.C. § 6903(27) because such action does not come within the scope of the phrase "placing of [the abandoned contaminant] into or on any land or water so that [the abandoned contaminant] or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters." *See 3550 Stevens Creek Assocs.*, 915 F.2d at 1361. The statute defines "release" as "any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment (including the abandonment

(Cont'd)

Appendix B

Asbestos "released" within a building or several buildings is not equivalent to being "released" into the environment. *See Covalt v. Carey Canada Inc.*, 860 F.2d 1434, 1436-37 (7th Cir.1988).

Ultimately, determining whether a "disposal" occurred requires this Court to return to the meaning of "solid waste." According to 42 U.S.C. § 6903(27), "solid waste" is "any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and other discarded material. . . ." The Site is an industrial park, not a waste treatment plant, water supply treatment plant, or air pollution control facility. Therefore, the relevant question is whether SIPA provided facts from which a reasonable

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(Cont'd)

or discarding of barrels, containers, and other closed receptacles containing any hazardous substance or pollutant or contaminant). . . ." 42 U.S.C. § 9601(22). The statute further defines "environment" as "(A) the navigable waters, the waters of the contiguous zone, and the ocean waters of which the natural resources are under the exclusive management authority of the United States under the Fishery Conservation and Management Act of 1976, and (B) any other surface water, ground water, drinking water supply, land surface or subsurface strata, or ambient air within the United States or under the jurisdiction of the United States." 42 U.S.C. § 9601(8). SIPA has not introduced evidence from which a reasonable factfinder could conclude the asbestos containing materials at issue here have been released into the environment. Its evidence merely consists of denigrations of Ericsson's "expert" testimony and the fact that some of the pipes may be underground and others, covered by chases, extend outside between buildings.

factfinder can conclude Ericsson "discarded" or abandoned the materials within the meaning of the statute. This Court finds as a matter of law, under the facts presented in these summary judgment proceedings, Ericsson neither discarded or abandoned the asbestos materials. The materials here were attached to the buildings that made up the Site as insulation on pipes, boilers, and other equipment. The only way that Ericsson could have discarded or abandoned the boiler system and the asbestos materials within the meaning of CERCLA is if it discarded or abandoned the entire Site itself or detached the system or asbestos materials and left them on the premises. Ericsson did no such thing; it simply stopped using the old system, installed a new system and then sold the Site. The fact that Ericsson, as a tenant/lessee responsible for its own heat, chose not to operate the old boiler-based system, and instead utilized a gas-based system, does not in anyway impact this Court's conclusion that no disposal of hazardous waste took place. SIPA concedes that at according to its basic everyday usage, the term "disposal" means the act or process of getting rid of something. The facts unambiguously demonstrate that Ericsson took no actions, not a single step, towards ridding itself of the boiler-based system.

This Court concludes that under the current definitions utilized by CERCLA, there is no genuine issue of material fact from which a reasonable factfinder could conclude Ericsson is liable for the disposal of asbestos at the Site.

Appendix B

RCRA Claim

Ericsson contends that SIPA's RCRA claim should also be dismissed. It argues that since the definition of "disposal" is the same under CERCLA and RCRA, CERCLA case precedent compels the logical conclusion that Ericsson's conduct as alleged in the Complaint does not fall within the ambit of RCRA. SIPA responds that the scope of conduct that falls under the purview of RCRA is broader than mere "disposal."

To establish a *prima facie* imminent hazard citizen suit claim under RCRA, a plaintiff must allege (1) that the defendant has generated solid or hazardous waste, (2) that the defendant is contributing to or has contributed to the handling, storage, disposal, treatment or transportation of this waste, and (3) that this waste may present an imminent and substantial danger to health or the environment. 42 U.S.C. § 6972(a)(1)(B); *Albany Bank & Trust Co. v. Exxon Mobil Corp.*, 310 F.3d 969, 972 (7th Cir.2002) (citations omitted). RCRA amended certain provisions of the Solid Waste Disposal Act. *See* 42 U.S.C. § 6901 *et seq.*

As discussed before, the RCRA defines "solid waste" as meaning "any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and other discarded material. . . ." 42 U.S.C. § 6903(27). This Court concluded above that "discarded material" could not include materials fixed to a building itself, unless the building was discarded or the materials were detached from the

building and left on the premises. There is no reason to deviate from that conclusion under RCRA.

In *Remington Arms Company*, after reviewing the legislative history of RCRA, the Second Circuit held that the statute was designed to "regulate discarded material and hazardous wastes" and to also deal with products that had "served their intended purposes and are no longer wanted by the consumer." 989 F.2d 1305, 1314. While SIPA has presented facts from which a reasonable factfinder could conclude that Ericsson regarded the heating system as having served its intended purpose of providing heat and it was no long desired for that purpose (as evidenced by the use of a new heating system), SIPA cannot demonstrate that the boiler-based system was "discard material" under RCRA. The *Remington Arms Company* decision and the cited corresponding legislative history clearly show that when Congress mentioned that the term "solid waste" included products that no longer served their intended purposes and were no longer wanted by the customer, it was in fact referring to the factors of production in this nation's industries' various manufacturing processes, not to obsolete building materials in an otherwise useful building. H.R. NO. 94-1491, pt. 1, at (1976), *as reprinted in* 1976 U.S.C.C.A.N. 6238, 6240 ("It is not only the waste by-products of the nation's manufacturing processes with which the committee is concerned; but also the products themselves once they have served their intended purposes and are no longer wanted by the consumer").

Nor do the asbestos-containing heating materials at issue here satisfy RCRA's definition of "hazardous material." Discarded materials must first be solid materials in order to be included within the subset of "hazardous materials." Section 6703(5). This Court concludes that the term "solid waste" utilized by RCRA can not and does not include the discontinued use of a boiler-based heating system left in the same place where originally affixed on a building structure unless it is alleged that the building itself is discarded. Since SIPA cannot provide facts from which a reasonable factfinder could conclude Ericsson discarded the Site itself, summary judgment is granted to Ericsson on the RCRA claim.

Supplemental Claims of Nuisance and Negligence

Having granted Ericsson summary judgment on the issues of whether it violated CERCLA and RCRA when it left a discontinued heating system containing asbestos in place in and throughout several buildings later transferred to SIPA, this Court declines to exercise supplemental jurisdiction over the state law claims of nuisance and negligence. Those claims are hereby dismissed without this Court expressing any opinion as to the merits of either claim.

IV. CONCLUSION

For the foregoing reasons, Ericsson's Motion for Summary Judgment is GRANTED in part. SIPA's Motion for Partial Summary Judgment is DENIED. This Court declines to exercise supplemental jurisdiction over SIPA's state law claims and dismisses them without expressing any opinion as to their merit.

Enter:

/s/ David H. Coar
David H. Coar
United States District Judge

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DENYING PETITION FOR REHEARING DATED NOVEMBER 18, 2008

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

November 18, 2008

Before

Hon. JOEL M. FLAUM, *Circuit Judge*
Hon. ANN CLAIRE WILLIAMS, *Circuit Judge*
Hon. DIANE S. SYKES, *Circuit Judge*

No. 08-1118

SYCAMORE INDUSTRIAL PARK ASSOCIATES,
an Illinois general partnership,

Plaintiff-Appellant,

v.

ERICSSON, INCORPORATED,
a Delaware corporation,

Defendant-Appellee.

Appendix C

ORDER

On consideration of the petition for rehearing and petition for rehearing en banc filed by the plaintiff-appellant in the above case on November 3, 2008, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny the petition. The petition is therefore DENIED.

APPENDIX D — 42 U.S.C. § 6902

§ 6902. Objectives and national policy

(a) Objectives

The objectives of this chapter are to promote the protection of health and the environment and to conserve valuable material and energy resources by—

(1) providing technical and financial assistance to State and local governments and interstate agencies for the development of solid waste management plans (including resource recovery and resource conservation systems) which will promote improved solid waste management techniques (including more effective organizational arrangements), new and improved methods of collection, separation, and recovery of solid waste, and the environmentally safe disposal of nonrecoverable residues;

(2) providing training grants in occupations involving the design, operation, and maintenance of solid waste disposal systems;

(3) prohibiting future open dumping on the land and requiring the conversion of existing open dumps to facilities which do not pose a danger to the environment or to health;

(4) assuring that hazardous waste management practices are conducted in a manner which protects human health and the environment;

(5) requiring that hazardous waste be properly managed in the first instance thereby reducing the need for corrective action at a future date;

(6) minimizing the generation of hazardous waste and the land disposal of hazardous waste by encouraging process substitution, materials recovery, properly conducted recycling and reuse, and treatment;

(7) establishing a viable Federal-State partnership to carry out the purposes of this chapter and insuring that the Administrator will, in carrying out the provisions of subchapter III of this chapter, give a high priority to assisting and cooperating with States in obtaining full authorization of State programs under subchapter III of this chapter;

(8) providing for the promulgation of guidelines for solid waste collection, transport, separation, recovery, and disposal practices and systems;

(9) promoting a national research and development program for improved solid waste management and resource conservation techniques, more effective organizational arrangements, and new and improved methods of collection, separation, and recovery, and recycling of solid wastes and environmentally safe disposal of nonrecoverable residues;

(10) promoting the demonstration, construction, and application of solid waste management, resource recovery, and resource conservation systems which

preserve and enhance the quality of air, water, and land resources; and

(11) establishing a cooperative effort among the Federal, State, and local governments and private enterprise in order to recover valuable materials and energy from solid waste.

(b)National policy

The Congress hereby declares it to be the national policy of the United States that, wherever feasible, the generation of hazardous waste is to be reduced or eliminated as expeditiously as possible. Waste that is nevertheless generated should be treated, stored, or disposed of so as to minimize the present and future threat to human health and the environment.

APPENDIX E — 42 U.S.C. § 6903

§ 6903. Definitions

As used in this chapter:

* * *

(3) The term "disposal" means the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters.

* * *

(27) The term "solid waste" means any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and other discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, commercial, mining, and agricultural operations, and from community activities, but does not include solid or dissolved material in domestic sewage, or solid or dissolved materials in irrigation return flows or industrial discharges which are point sources subject to permits under section 1342 of Title 33, or source, special nuclear, or byproduct material as defined by the Atomic Energy Act of 1954, as amended (68 Stat. 923) [42 U.S.C.A. § 2011 et seq.].

* * * *

APPENDIX F — 42 U.S.C. § 6972

§ 6972. Citizen suits

(a) In general

Except as provided in subsection (b) or (c) of this section, any person may commence a civil action on his own behalf—

(1)(A) against any person (including (a) the United States, and (b) any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of any permit, standard, regulation, condition, requirement, prohibition, or order which has become effective pursuant to this chapter; or

(B) against any person, including the United States and any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution, and including any past or present generator, past or present transporter, or past or present owner or operator of a treatment, storage, or disposal facility, who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment; or

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.

Any action under paragraph (a)(1) of this subsection shall be brought in the district court for the district in which the alleged violation occurred or the alleged endangerment may occur. Any action brought under paragraph (a)(2) of this subsection may be brought in the district court for the district in which the alleged violation occurred or in the District Court of the District of Columbia. The district court shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce the permit, standard, regulation, condition, requirement, prohibition, or order, referred to in paragraph (1)(A), to restrain any person who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste referred to in paragraph (1)(B), to order such person to take such other action as may be necessary, or both, or to order the Administrator to perform the act or duty referred to in paragraph (2), as the case may be, and to apply any appropriate civil penalties under section 6928(a) and (g) of this title.

(b) Actions prohibited

(1) No action may be commenced under subsection (a)(1)(A) of this section—

(A) prior to 60 days after the plaintiff has given notice of the violation to—

(i) the Administrator;

(ii) the State in which the alleged violation occurs; and

(iii) to any alleged violator of such permit, standard, regulation, condition, requirement, prohibition, or order,

except that such action may be brought immediately after such notification in the case of an action under this section respecting a violation of subchapter III of this chapter; or

(B) if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States or a State to require compliance with such permit, standard, regulation, condition, requirement, prohibition, or order.

In any action under subsection (a)(1)(A) of this section in a court of the United States, any person may intervene as a matter of right.

(2)(A) No action may be commenced under subsection (a)(1)(B) of this section prior to ninety days after the plaintiff has given notice of the endangerment to—

(i) the Administrator;

(ii) the State in which the alleged endangerment may occur;

(iii) any person alleged to have contributed or to be contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or

hazardous waste referred to in subsection (a)(1)(B) of this section,

except that such action may be brought immediately after such notification in the case of an action under this section respecting a violation of subchapter III of this chapter.

(B) No action may be commenced under subsection (a)(1)(B) of this section if the Administrator, in order to restrain or abate acts or conditions which may have contributed or are contributing to the activities which may present the alleged endangerment—

(i) has commenced and is diligently prosecuting an action under section 6973 of this title or under section 106 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 [42 U.S.C.A. § 9606], [FN1]

(ii) is actually engaging in a removal action under section 104 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 [42 U.S.C.A. § 9604];

(iii) has incurred costs to initiate a Remedial Investigation and Feasibility Study under section 104 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 [42 U.S.C.A. § 9604] and is diligently proceeding with a remedial action under that Act [42 U.S.C.A. § 9601 et seq.]; or

(iv) has obtained a court order (including a consent decree) or issued an administrative order under section 106 of the Comprehensive Environmental Response, Compensation and Liability Act of 980 [FN2] [42 U.S.C.A. § 9606] or section 6973 of this title pursuant to which a responsible party is diligently conducting a removal action, Remedial Investigation and Feasibility Study (RIFS), or proceeding with a remedial action.

In the case of an administrative order referred to in clause (iv), actions under subsection (a)(1)(B) of this section are prohibited only as to the scope and duration of the administrative order referred to in clause (iv).

(C) No action may be commenced under subsection (a)(1)(B) of this section if the State, in order to restrain or abate acts or conditions which may have contributed or are contributing to the activities which may present the alleged endangerment—

(i) has commenced and is diligently prosecuting an action under subsection (a)(1)(B) of this section;

(ii) is actually engaging in a removal action under section 104 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 [42 U.S.C.A. § 9604]; or

(iii) has incurred costs to initiate a Remedial Investigation and Feasibility Study under section 104 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 [42 U.S.C.A. §

9604] and is diligently proceeding with a remedial action under that Act [42 U.S.C.A. § 9601 et seq.].

(D) No action may be commenced under subsection (a)(1)(B) of this section by any person (other than a State or local government) with respect to the siting of a hazardous waste treatment, storage, or a disposal facility, nor to restrain or enjoin the issuance of a permit for such facility.

(E) In any action under subsection (a)(1)(B) of this section in a court of the United States, any person may intervene as a matter of right when the applicant claims an interest relating to the subject of the action and he is so situated that the disposition of the action may, as a practical matter, impair or impede his ability to protect that interest, unless the Administrator or the State shows that the applicant's interest is adequately represented by existing parties.

(F) Whenever any action is brought under subsection (a)(1)(B) of this section in a court of the United States, the plaintiff shall serve a copy of the complaint on the Attorney General of the United States and with the Administrator.

(c) Notice

No action may be commenced under paragraph (a)(2) of this section prior to sixty days after the plaintiff has given notice to the Administrator that he will commence such action, except that such action may be brought

immediately after such notification in the case of an action under this section respecting a violation of subchapter III of this chapter. Notice under this subsection shall be given in such manner as the Administrator shall prescribe by regulation. Any action respecting a violation under this chapter may be brought under this section only in the judicial district in which such alleged violation occurs.

(d) Intervention

In any action under this section the Administrator, if not a party, may intervene as a matter of right.

(e) Costs

The court, in issuing any final order in any action brought pursuant to this section or section 6976 of this title, may award costs of litigation (including reasonable attorney and expert witness fees) to the prevailing or substantially prevailing party, whenever the court determines such an award is appropriate. The court may, if a temporary restraining order or preliminary injunction is sought, require the filing of a bond or equivalent security in accordance with the Federal Rules of Civil Procedure.

(f) Other rights preserved

Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any standard or

requirement relating to the management of solid waste or hazardous waste, or to seek any other relief (including relief against the Administrator or a State agency).

(g) Transporters

A transporter shall not be deemed to have contributed or to be contributing to the handling, storage, treatment, or disposal, referred to in subsection (a)(1)(B) of this section taking place after such solid waste or hazardous waste has left the possession or control of such transporter, if the transportation of such waste was under a sole contractual arrangement arising from a published tariff and acceptance for carriage by common carrier by rail and such transporter has exercised due care in the past or present handling, storage, treatment, transportation and disposal of such waste.

APPENDIX G — 42 U.S.C. § 6973

§ 6973. Imminent hazard

(a) Authority of Administrator

Notwithstanding any other provision of this chapter, upon receipt of evidence that the past or present handling, storage, treatment, transportation or disposal of any solid waste or hazardous waste may present an imminent and substantial endangerment to health or the environment, the Administrator may bring suit on behalf of the United States in the appropriate district court against any person (including any past or present generator, past or present transporter, or past or present owner or operator of a treatment, storage, or disposal facility) who has contributed or who is contributing to such handling, storage, treatment, transportation or disposal to restrain such person from such handling, storage, treatment, transportation, or disposal, to order such person to take such other action as may be necessary, or both. A transporter shall not be deemed to have contributed or to be contributing to such handling, storage, treatment, or disposal taking place after such solid waste or hazardous waste has left the possession or control of such transporter if the transportation of such waste was under a sole contractural [FN1] arrangement arising from a published tariff and acceptance for carriage by common carrier by rail and such transporter has exercised due care in the past or present handling, storage, treatment, transportation and disposal of such waste. The Administrator shall provide notice to the affected State of any such suit. The Administrator may also, after notice to the affected State, take other action under this section including, but not limited to, issuing such orders as may be necessary to protect public health and the environment.

APPENDIX H — 42 U.S.C. § 9607

§ 9607. Liability

(a) Covered persons; scope; recoverable costs and damages; interest rate; "comparable maturity" date

Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section—

(1) the owner and operator of a vessel or a facility,

(2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,

(3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and

(4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for—

(A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan;

(B) any other necessary costs of response incurred by any other person consistent with the national contingency plan;

(C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release; and

(D) the costs of any health assessment or health effects study carried out under section 9604(i) of this title.

The amounts recoverable in an action under this section shall include interest on the amounts recoverable under subparagraphs (A) through (D). Such interest shall accrue from the later of (i) the date payment of a specified amount is demanded in writing, or (ii) the date of the expenditure concerned. The rate of interest on the outstanding unpaid balance of the amounts recoverable under this section shall be the same rate as is specified for interest on investments of the Hazardous Substance Superfund established under subchapter A of chapter 98 of Title 26. For purposes of applying such amendments to interest under this subsection, the term "comparable maturity" shall be determined with reference to the date on which interest accruing under this subsection commences.

Appendix H

(b) Defenses

There shall be no liability under subsection (a) of this section for a person otherwise liable who can establish by a preponderance of the evidence that the release or threat of release of a hazardous substance and the damages resulting therefrom were caused solely by—

(1) an act of God;

(2) an act of war;

(3) an act or omission of a third party other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the defendant (except where the sole contractual arrangement arises from a published tariff and acceptance for carriage by a common carrier by rail), if the defendant establishes by a preponderance of the evidence that (a) he exercised due care with respect to the hazardous substance concerned, taking into consideration the characteristics of such hazardous substance, in light of all relevant facts and circumstances, and (b) he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions; or

(4) any combination of the foregoing paragraphs.

Appendix H

(c) Determination of amounts

(1) Except as provided in paragraph (2) of this subsection, the liability under this section of an owner or operator or other responsible person for each release of a hazardous substance or incident involving release of a hazardous substance shall not exceed—

(A) for any vessel, other than an incineration vessel, which carries any hazardous substance as cargo or residue, $300 per gross ton, or $5,000,000, whichever is greater;

* * * *

APPENDIX I — 40 C.F.R. § 261.2

§ 261.2 Definition of solid waste.

(a)(1) A solid waste is any discarded material that is not excluded under § 261.4(a) or that is not excluded by a variance granted under §§ 260.30 and 260.31 or that is not excluded by a non-waste determination under §§ 260.30 and 260.34.

(2)(i) A discarded material is any material which is:

(A) Abandoned, as explained in paragraph (b) of this section; or

(B) Recycled, as explained in paragraph (c) of this section; or

(C) Considered inherently waste-like, as explained in paragraph (d) of this section; or

(D) A military munition identified as a solid waste in § 266.202.

(ii) A hazardous secondary material is not discarded if it is generated and reclaimed under the control of the generator as defined in § 260.10, it is not speculatively accumulated as defined in § 261.1(c)(8), it is handled only in non-land-based units and is contained in such units, it is generated and reclaimed within the United States and its territories, it is not otherwise subject to material-specific management conditions under § 261.4(a) when reclaimed, it is not a spent lead acid battery (see § 266.80 and § 273.2), it does not meet the listing description for

Appendix I

K171 or K172 in § 261.32, and the reclamation of the material is legitimate, as specified under § 260.43. (See also the notification requirements of § 260.42). (For hazardous secondary materials managed in land-based units, see § 261.4(a)(23)).

(b) Materials are solid waste if they are abandoned by being:

(1) Disposed of; or

(2) Burned or incinerated; or

(3) Accumulated, stored, or treated (but not recycled) before or in lieu of being abandoned by being disposed of, burned, or incinerated.